

IN THE MATTER OF a Board of Inquiry
appointed pursuant to s.38(1) of the
Human Rights Code, R.S.O. 1990, c.H.19

BETWEEN

MIKE NARAINÉ

Complainant

- and -

FORD MOTOR COMPANY OF CANADA LTD.,

GORD BATSTONE, GEORGE GOYTON, ANDY BARR, W.H. DOBSON,

BOB DARROGON AND MIKE TEIGHE

Respondents

Date of Complaints: 24 May 1985 and 24 October 1985

Date of Decision:

Board of Inquiry: Professor Constance Backhouse

Counsel: Counsel for the Commission, Mark Hart

Counsel for the Complainant, Fiona Campbell

Counsel for the Respondents, Russell Juriansz

INTERIM DECISION

This complaint involves a claim by Mike Naraine that his right to equal treatment with respect to employment has been infringed because of his race, colour, place of origin and ethnic origin, contrary to section 4(1), 4(2), 7, 8 and 10 of The Human Rights Code, R.S.O. 1990, c.H.19. At the outset of the hearing, counsel for the respondents brought a motion to dismiss or stay the proceedings on several grounds.

1. Failure to Attempt to Conciliate

Respondents argued that the Commission had a statutory duty to attempt to effect a settlement of the complaint pursuant to s. 33(1) of the Code, which provides that "the Commission shall investigate a complaint and endeavour to effect a settlement." The fulfilment of this obligation, it was argued, was a condition precedent to the Commission's authority to request the appointment of a board of inquiry. Respondents asserted that failure to conciliate deprived the Commission of its jurisdiction to request the appointment of a board of inquiry.

The evidence elicited at the hearing revealed that Anne Carrick, the investigating officer for the Commission, did make serious efforts to meet with the complainant and his counsel to discuss prospects for settlement. The record showed a somewhat less extensive endeavour with respect to the respondents. In the early stages of investigation, Ms. Carrick held several meetings, including a fact-finding conference on 29 August 1985, with

representatives of Ford and their counsel. Ms. Carrick testified that "because of the divergence in opinion expressed by the parties and their counsel at the fact-finding conference", she concluded that it would be "an exercise in futility to attempt conciliation at that time." Ms. Carrick also testified that she telephoned counsel for the respondents at some point in the fall of 1987. Her recollection was that settlement issues were addressed, and that she proposed the possibility of a monetary payment from Ford to the complainant, Mr. Naraine. She stated that she "specifically recall[ed] Mr. Jovanovic [then counsel for the respondents] expressing his incredulity during this discussion." Mr. Jovanovic's memory of the conversation was somewhat different. He recalled a telephone conversation on either September 6th or 10th, 1987, at which Ms. Carrick advised him that there was "insufficient evidence to proceed before a Board" but that her investigation had uncovered "a number of other possible discriminatory acts on the part of the company that should be addressed." He testified that he had no recollection that any monetary settlements for Mr. Naraine were discussed at this time. He recalls that a meeting was set for 29 October 1987 to review the matter in entirety. Ms. Carrick called to postpone the meeting on 21 October 1987, and it was never rescheduled.

Ms. Carrick had been seconded from her investigatory position at the Windsor office to the Commission's head office in Toronto during the fall of 1987, and then was away from her job

on maternity leave from June 1988 to January 1989, and again from January 1990 to October 1990.. Further meetings expressly devoted to the purpose of discussing settlement were not held until April 1993, after a board of inquiry had been appointed, when Commission counsel and complainant's counsel met with Ford officials in Oakville. These discussions were unsuccessful.

A motion to dismiss for failure to attempt to conciliate was considered in Findlay and Mackay v. Mike's Smoke & Gifts et al. (unreported, 22 October 1993, Ont. Board of Inquiry), where the majority of the board of inquiry held that the Commission's failure to approach the respondents and negotiate settlement "was a statutory condition precedent to the appointment of this Board, and a failure to meet that statutory obligation renders the appointment of this Board null and void."

It is my view that Findlay and Mackay can be distinguished from this case in a number of respects. In Findlay and Mackay, the respondents were unrepresented by counsel, and had to struggle against language barriers and lack of familiarity with the process of human rights complaints. The respondents' relative inexperience with the nature of legal proceedings was central to the majority position. The board's decision to mandate that the Commission undertake a particularly fulsome effort toward conciliation arose out of a sense of concern that such technically unsophisticated parties required considerable assistance in understanding the scope and methodology of human rights inquiries. Few such concerns exist here. In contrast to

the respondents in Findlay and Mackay, the respondent Ford is a large corporation with extensive expertise in labour relations and human rights law, represented by legal counsel at all stages of the complaint. The obligation on the Commission to ensure that full settlement discussions are initiated would appear to be greater in the case of unsophisticated respondents than in cases such as ours.

In addition, in Findlay and Mackay the Commission "conceded that it did not engage the respondents in any conciliation discussions." That is not the situation here, where the Commission asserts that it did attempt to conciliate. The evidence shows that the issue of conciliation was first put on the table by the Commission when it sent out its written notice regarding the fact-finding conference in August of 1985. This notice advised the parties that "immediately following the fact-finding conference an opportunity is provided for a settlement of the complaint", and that "settlement negotiations of this nature are conducted 'without prejudice' to either party." As the matter progressed, it became apparent to Ms. Carrick that there was little potential of reaching a settlement at this fact-finding meeting, and nothing further was pursued at that time. However, counsel for Ford, Mr. Jovanovic, was clearly on notice of the possibility of embarking upon settlement negotiations. In August 1987, Ms. Carrick met with the complainant and his counsel to discuss conciliation, and learned that Mr. Naraine was seeking job reinstatement and full compensation for lost wages and

benefits. Her discussions with respondents' counsel disclosed unequivocally that Ford was entirely unprepared to meet these demands. Ms. Carrick testified that she telephoned Mr. Jovanovic and explored whether Ford would be willing to make an offer of general damages by way of settlement. Mr. Jovanovic recalls no discussion of monetary settlement. However, Mr. Jovanovic admitted that he was not testifying from direct memory, but from a reconstruction based upon his reporting letter to his client. He testified that he always communicated monetary settlement offers to a client, and since there was nothing in his correspondence to this effect, he concluded no offer had been discussed. Ms. Carrick, however, would not have been in a position to make a specific settlement proposal, particularly given the complainant's insistence upon reinstatement. The discussion was likely more in the nature of a preliminary exploration to determine whether Ford was prepared to make an initial overture toward settlement. It is quite possible that Mr. Jovanovic did not interpret this as a concrete settlement proposal, and hence did not make a specific report to his client.

Furthermore, the "case disposition" document prepared by Commission staff in 1989, contains a brief reference to settlement discussions held in 1988. It notes:

Acting Manager, Walter Burns, met with the respondent counsel in the Fall of 1988 to discuss monetary compensation and qualitative educational proposals. Respondent counsel advised that educational initiatives were underway in the form of Employment Equity strategies but that the evidence did not warrant any monetary compensation no matter how nominal.

Walter Burns testified that he had no current recollection of the scope of this meeting, but that his signature on the case disposition form in 1989 attested to the validity of the statements in the report. After listening to all of the witnesses and their recollections, it is my view that the evidence suffices to establish that settlement efforts were made.

Even if I had found otherwise, however, I would have dismissed respondents' jurisdictional argument on this point. I have carefully reviewed the contrasting decisions of the majority and the minority members of the board of inquiry in Findlay and Mackay v. Mike's Smoke & Gifts et al., and prefer the reasoning set forth by the dissenting member of the panel, R. Hartman, who refused to agree with the majority that "the Commission's failure to satisfactorily discharge its obligations under s.33 [now s.34] formed a mandatory condition precedent to a Board's valid appointment." Instead, Ms. Hartman held that motions to dismiss for lack of conciliation prior to the appointment of a board "are not properly the subject of a Board's determination of its prima facie jurisdiction" (at 1-2). To allow otherwise, she concluded, would ensure that "future boards would become, at least initially, inquiries into bureaucratic complaints, not human rights complaints...." (at 7).

The recent decision in Joan Slung and Vida Agyeman v. Geiger International Ltd. and Domenic Carnavale (unreported, 6 July 1993, Ontario Board of Inquiry) also supports this position. In this case, Ian Springate refused to dismiss a complaint for want

of settlement initiatives on the part of the Commission. He wrote:

Section 33(1) of the Code provides that "the Commission shall investigate a Complaint and endeavour to effect a settlement." I do not agree with counsel for Geiger International Ltd. that this necessarily requires that the Commission engage in settlement discussions with all parties to a complaint. Not only does the section not specifically require that discussions be held with all parties, but settlement discussions with all of the parties may serve no useful purpose if one party has indicated an intention not to reach a settlement.
(at 2).

As the board of inquiry notes in this case, it might have been "preferable" that the Commission approach the respondent about possible settlement terms, but its failure to do so was not fatal to the board's jurisdiction to hear the complaint.

Settlement prospects are an elusive matter, dependent upon timing, the symbiotic and vacillating moods of the parties, and a host of other complex and transitory factors. Assessing the potential for resolution is a sophisticated art, and the possibility of having an independent tribunal accurately review the endeavours and activities of the Commission months or years after the discussions in question is fraught with difficulty. Furthermore, we are all conscious of the increasing pressure on government agencies to produce more with fewer and fewer resources. For boards of inquiry to sit back and second-guess whether the Commission has held sufficient meetings, written sufficient letters, and exchanged sufficient settlement proposals is to inject a note of artificiality into the process, far removed from the day-to-day workings of government officials.

For these reasons, I prefer Ms. Hartman's conclusions that the words "failed to effect" a settlement do not mean anything more than "some effort being made to explore settlement possibilities, or to leave this open as an option" (at 17).

I do not want to leave this issue without fully addressing the analysis of the majority members of the board in Findlay and Mackay, as set forth by Loretta Mikus. The basis for Ms. Mikus's ruling seems to have been her insistence that the main thrust of the human rights process is education, discussion, negotiation and conciliation. Failure to concentrate fully upon settlement initiatives means that an adversarial approach takes precedence over the conciliatory focus. She expresses these ideas in the following passages:

The purpose of the Code is to eliminate discrimination and discriminatory practices by promoting an understanding and acceptance of and compliance with the Code.

In failing to endeavour to settle this matter, the Commission chose to seek compliance with the Code in the adversarial forum of a hearing before a three person Board of Inquiry.

It is obvious from section 29 that the legislature of Ontario expected the Commission to promote the goals of the Code through education, encouragement and co-operation. To that end, it is required to take a proactive role in assisting the people of Ontario to understand and comply with the provisions and prohibitions contained in the Code. When its powers of persuasion and encouragement are unsuccessful, the focus of the Commission shifts from education and co-operation to enforcement.... However, these enforcement functions do not displace its initial obligations to seek compliance through education and cooperation. The Commission, at this stage of the complaint, is mandated to investigate the complaint to determine whether or not a right under the Code has been infringed. If, after its investigation, it is

satisfied that a valid complaint exists, it is compelled, by statute, to attempt to settle the dispute. The requirement that the Commission attempt to settle the dispute was not meant to be merely a procedural step in the process. It was a legislative directive to the Commission to fulfil its functions under the Code by seeking a resolution to the problem that would promote the goals of the Code.

At this stage of the proceedings, the Commission had not yet assumed its role as advocate for the complainants. It remained obliged, by statute, to seek compliance through its normal procedures of conciliation. Only after it had fulfilled its role as investigator/educator/conciliator was it entitled to adopt the role of advocate. In my view, the Commission, in its desire to adjudicate this complaint, went directly to the role of advocate without regard for its responsibilities to seek a less confrontational form of compliance. (at 20-23.)

This interpretation of the Code has attained a certain degree of general acceptance, and views such as these have been expressly adopted by many human rights adjudicators and courts. However, some human rights advocates have begun to express concern that this perspective has achieved a certain rigidity, and that it may, in some cases, be unjustified. The traditional view tends to perceive discrimination as essentially a problem of prejudicial attitude, which can be resolved through counselling, education and sincere attempts to communicate about difference, to negotiate towards common understandings and values. Such perspectives may, on occasion, tend to minimize the role of historical, institutional and structural inequities which contribute to current attitudes and behaviour, and which frequently resist resolution through education and counselling. Where structural inequalities are challenged, as they are increasingly frequently by human rights complainants, the

traditional modes of processing such cases may not provide the best mechanisms for resolving disputes. Some complaints rooted in structural discrimination may admit of resolution only through advocacy and adversarial hearings. Prolonged efforts at negotiation and settlement in such cases, vigorously scrutinized and supervised by tribunals and courts, may prove counter-productive to bringing the underlying issues open to full and public resolution.

In my view, there is nothing in the Code itself which irretrievably requires that we view it as a statute whose primary focus is education, encouragement and cooperation. The preamble speaks of "equal and inalienable rights" and notes that it is public policy to "provide for equal rights and opportunities without discrimination." It is true that it goes on to speak of "the creation of a climate of understanding and mutual respect," but whether this is better achieved through conciliation and education or through advocacy and public hearings is open to debate. The functions of the Commission, as set out in s.29, speak of "programs of public information and education", and the "promot[ion of] understanding" as well as obligations to "inquire into incidents [of discrimination]", to "take appropriate action to eliminate the source of tension or conflict," to "initiate investigations", and "to enforce" the Code. This does not explicitly stress an approach of education and conciliation over investigation, advocacy and enforcement.

There will be occasions where a counselling approach is

beneficial. There will be others where advocacy and enforcement is better calculated to reduce patterns and incidents of discrimination. Evaluating which is preferable is something which is better left with the Commission itself. It should not be second-guessed by boards of inquiry, whose actual mandate is to conduct a hearing de novo to determine the merits of the complaints put before it.

No one would wish to force parties to engage in adversarial hearings where there was any real prospect of settlement. But even after the appointment of a board of inquiry, there are still significant opportunities for the parties to discuss resolution of the complaint. Within the past few years, the Board of Inquiry office has begun to schedule "case conferences" prior to hearings, where a professional adjudicator meets with the parties to explore all possible avenues for conciliation. The settlement rate with "case conferences" is quite good, with a large proportion of disputes achieving resolution at this stage. We need not fear that failure to achieve settlement at the earlier investigatory stage means that we are irretrievably consigning unwilling parties to lengthy and expensive public hearings. In passing, I note that in this case, settlement discussions did take place after the appointment of a board of inquiry, but failed to achieve success. The outcome suggests that Ms. Carrick may have been correct in her earlier assessment that settlement prospects were minimal.

Finally, there are other, more appropriate remedies

available where the Commission's early efforts at settlement are notoriously deficient. As Ms. Hartman properly noted in Findlay and Mackay, complaints may be lodged with the provincial ombudsman or by way of judicial review to the courts.

Furthermore, "feebleness in terms of settlement exploration may well be relevant to conclusions reached by a Board, after a full hearing, as to costs and to remedies ordered if a particular complaint is upheld" (at 19-20). But failure to press settlement efforts with vigour ought not to form a condition precedent to the jurisdiction of this board.

2. Abuse of Process

The respondents also asked the Board to dismiss or stay the proceedings to prevent an abuse of process. Several additional arguments were put forth on this motion.

A. Delay

Counsel for the respondents argued that there was excessive delay in bringing this case forward to a hearing. The complainant, Mike Naraine, initially contacted the Commission in February of 1984. His first complaint was lodged on 24 May 1985, and his second, filed after his termination from employment, was lodged on 24 October 1985. The complaints allege a variety of incidents combining to create a discriminatory working environment, some of which stretch back to the early years of Mr. Naraine's employment with Ford, which originated in 1976. The

Commission's investigation took from 1984 to 1992. Professor Robert Kerr was appointed as a board of inquiry on 5 February 1993. Due to his serious illness, he resigned prior to the hearing on 14 October 1993. This board of inquiry was appointed on 15 November 1993. The chronology of this complaint reveals a process encompassing undeniable and extensive delay, much of it apparently attributable to the Commission's difficulties in processing its cases internally.

In assessing whether delay has caused an abuse of process, Ontario boards of inquiry have adopted the standard set out in Hyman v. Southam Murray Printing (No. 1) (1982), 3 C.H.R.R. D/617 (Ont. Bd. Inq., McCamus) at D/621:

[W]hile unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy or in weighing the persuasive...force or credibility of testimony or other evidence, delay in initiating or processing a complaint should not be considered as a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned...a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible. In the absence of such, admittedly unlikely, circumstances, the proper course, in my opinion, is for the board of inquiry to proceed and to weigh the substantial prejudice or unfairness to a particular party which may have been occasioned by delay in making particular findings of fact or in refusing or fashioning a remedy.

[See also: Maddox v. Vogue Shoes unreported, 8 April 1991 (Ont. Bd. Inq., Pilkington); Quereshi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527 (Ont. Bd. Inq.,

Ratushny); Gosh v. Domglass Inc., unreported, 22 November 1991 (Ont. Bd. Inq., Hubbard); Gohm v. Domtar (No. 1) (1989), 10 C.H.R.R. D/5968 (Ont. Bd. Inq., Pentney); McMinn v. Sault Ste. Marie Firefighters Assn. (1986), 7 C.H.R.R. D/3453 (Ont. Bd. Inq., Zemans); Shepherd v. Bama Artisans (1988), 9 C.H.R.R. D/5409 (Ont. Bd. Inq., Backhouse); Gale v. Miracle Food Mart (no. 2) (1992), 17 C.H.R.R. D/495 (Ont. Bd. Inq., Backhouse) as upheld on this point in Great Atlantic & Pacific Co. of Canada, Limited v. Ontario Human Rights Commission, Constance Backhouse, United Food and Commercial Food Workers Int'l Union, Locals 175 and 633, Steinberg Inc. and Diane Gale (No. 3) (1993) 18 C.H.R.R. D/97 (Ont. Div. Ct.).]

The appropriate test, then, appears to be whether the passage of time has rendered it impossible for this board of inquiry to determine whether a breach of the Code occurred. Counsel for the respondents claimed that the delay had created substantial prejudice to their clients, in that one of the relevant witnesses had died, two had left the country, and several others had retired or left the employ of the respondent company. Counsel spent some time examining and cross-examining witnesses regarding the potential importance of these individuals for the evidence in this case. But I was not ultimately convinced that their absence would make it impossible to adjudicate fairly upon this complaint. Furthermore, the whereabouts of some of these witnesses are known. Others may be traceable, as one witness for the company admitted with some candour in his cross-examination.

Respondents' counsel also argued that the passage of time had meant the loss of certain relevant documents, including some shift assignment ledgers and employee disciplinary records (the latter of which are purged from company files after three years, pursuant to requirements of the collective agreement). Once

again, I was not convinced that the absence of these records will make it impossible to continue with the hearing. The shift assignment records from July 1982 to June 1983 are available, and viva voce evidence from various electricians and maintenance supervisors can be called to establish or contest patterns in shift assignment. The respondents retain permanent and extensive files on the disciplinary history of Mr. Naraine, since his grievances concerning discipline and termination resulted in an arbitration hearing. The documentary evidence may be somewhat less than complete, but it has not been demonstrated that it is obviously insufficient to permit of equitable review at a hearing.

Although the case will probably be more difficult to argue as a result of the delay, it does not appear that the board of inquiry's statutory mission has been rendered impossible. There are individuals available, both managers and employees, who can testify to the events and practices concerned. In Nisbett v. Manitoba Human Rights Commission and Donald Knight, (unreported, 30 March 1993, Man. CA) at p. 19, the court stated: "The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing." In Guthro v. Westinghouse Canada Inc. (No.2), (1991) 15 C.H.R.R. D/388 (Ont. Bd. Inq., Gorsky), the board noted:

In the case at hand, the time interval from the first alleged infraction of the Code to the present is about nineteen years. If delay alone were to be considered as the sole criterion, there would be no need to

proceed with the case. However, the concept of unreasonable delay will not, by itself, be a bar to hearing the facts of the matter. The matter may be analogized to the equitable doctrine of laches, where the key question is whether the delay caused prejudice to a particular party. Only by submitting evidence of such prejudice will the party be afforded an opportunity to succeed; the passage of time does not create an automatic dismissal of a complaint.

(at para. 11).

In my view, the record does not disclose prejudice of the magnitude contemplated in Nisbett, nor does the prejudice alleged by the respondent fall within the level specified as required in Guthro: "more than inconvenience", "sufficiently oppressive to prevent a response or defence from being made", and "an unsurmountable problem" (at para. 21 and 22). Under the circumstances, I have concluded that it would not be an abuse of process to continue the hearing in this case. I will, however, take appropriate account of the delay when it comes to weighing the evidence and fashioning the remedy in this complaint.

B. Lack of Disclosure and Insufficient Particularity

Respondents' counsel noted that during the initial phases of the investigation, the Commission's investigating officer came to the conclusion that the complainant was not entitled to reinstatement and compensation for lost wages and benefits. This preliminary position was allegedly overturned at a higher level within the Commission as the investigation proceeded. The respondents argued that they were not informed of the revised position when it was first developed, and that this prejudiced their ability to defend the case.

While it would have been preferable for the Commission to provide fuller and more immediate disclosure to the respondents, I am not convinced that this constitutes an abuse of process. The Code places the decision-making authority to request the appointment of a board of inquiry with the Commissioners. It is they who must review the files compiled by their staff, evaluate the information, and develop sound, consistent and comprehensive policies regarding enforcement. Respondents who rely upon informal communication with investigating officers, particularly where the Commission's legal counsel and the Commissioners have as yet to examine the file, do so at their own peril.

Possibly in reliance upon the investigating officer's initial position, respondents also challenged the Commission's decision to request the appointment of a board of inquiry, arguing that, in accordance with s.36(1) of the Code, there was insufficient evidence to proceed. Having examined the materials filed in connection with the preliminary motion, I must, with respect, disagree. As for the concern expressed by respondents' counsel that the documents disclosed are lacking in particulars, I have reviewed the book of documents disclosed by the Commission, and am of the view that the record does not bear this out.

C. Investigatory Bias of the Commission

Respondents' counsel also argued that the role taken by the investigating officer amounted to an abuse of process. It was

alleged that Ms. Carrick acted as an advocate, rather than a neutral investigator, that she formed her own theory of the case and refused to follow leads or evidence which did not fit with this theory, that on one occasion she met directly with Ford officials when their counsel was not present, and that she prepared case summary documents which were unfavourable to the respondents. I find this argument somewhat peculiar, in that the evidence also showed that throughout much of this investigation, Ms. Carrick opposed the remedy sought by the complainant, and apparently attempted to convince the Commissioners that he was not entitled to the reinstatement and level of compensation he was seeking. Nevertheless, in his cross-examination of Ms. Carrick, respondents' counsel was able to point to inadequacies in her investigation in a number of respects.

In my view, however, even if respondents' counsel were able to prove unequivocally that the investigating officer lacked impartiality, this would be insufficient to bar a hearing de novo on the merits of this complaint. None of the material obtained during the investigation is relevant to the instant adjudication unless Commission counsel decides to call the investigating officer and introduce her reports as evidence in the hearing on the merits. At that time, respondents' counsel will be well within his rights to cross-examine the witnesses and probe the written record of any documentation she may have compiled. Any deficiencies or unevenness in the evidence can be fully canvassed at that point. If respondents' counsel have concerns over the

Commission's conduct during the investigation of this case, their remedy is to pursue these arguments in Divisional Court. I agree with the position taken by R. Hartman in Findlay and Mackay:

In my interpretation of the Code, concerns regarding the Commission's conduct or handling of a complaint prior to the appointment of a Board are not a matter going to that Board's prima facie jurisdiction, as determinable by that Board. ... In my view, such a focus at the outset of an inquiry was never contemplated by the Legislature in drafting the Code. It could not have been the Legislature's intention that human rights complaints would be dismissed by ad hoc Boards without a hearing on their merits, based on the Commission's handling or processing of such complaints. It is difficult to see how this would promote the stated objective of a "climate of understanding" in the area of human rights in Ontario.

(at 7).

D. Cumulative Effect: The Shreve Decision

Respondents' counsel also argued that the board should consider the issue of delay, lack of timely disclosure, and the alleged bias of the Commission's investigatory process in combination. Even though each, by itself, might not cause a board to dismiss the complaint for abuse of process, taken together, they amounted to sufficient case to make an order of dismissal. In this argument, they relied upon Shreve v.

Corporation of the City of Windsor, (1993) 18 C.H.R.R. D/363

(Ont. Bd. Inq., Kerr), where it was stated:

[T]aken separately, bias of the investigating officer, lapse of time, and restricted disclosure by the Commission would not necessarily, nor on the facts of this case, deprive the respondents of a fair hearing at the board of inquiry stage. In combination, however, these circumstances seriously prejudiced the ability of the respondents to prepare their case in a timely fashion. This violates the principle of fairness. It causes prejudice that cannot really be cured at the

board of inquiry stage since one power a board definitely lacks is that to turn back the clock.
(at para. 103).

Professor Kerr made his ruling in Shreve based upon the peculiar facts of that case. Without having heard the evidence before him, I am in no position to critique the decision he rendered in the circumstances of that particular hearing. I do, however, wish to register some concern over the implications of Professor Kerr's decision for future boards of inquiry. I anticipate that respondents will increasingly seek to bring lengthy preliminary motions for dismissal, based upon a host of factors such as delay, alleged improprieties in the Commission's process of investigation, insufficient disclosure, lack of particulars, and failure to engage in lengthy and explicit settlement negotiations. This will divert resources away from adjudicating the fundamental matters which underlie human rights disputes, and require boards of inquiry to sit in supervision over the bureaucratic processes of human rights investigations instead.

I do not wish to minimize the very real problems encountered by both complainants and respondents in the human rights procedures currently mandated by the Code. The delays are reprehensible. The investigations may be less than thorough, with grievous gaps in the materials collected. The hierarchical process in which the file originally compiled by the investigating officer is reviewed by various levels of supervision, through to Commission counsel and the Commissioners

themselves, may be unwieldy, complex, and even torturous at times. But our current jurisprudence stipulates that this is the only avenue we have in Ontario to obtain a hearing in human rights disputes. This is the only forum in which complainants can have their rights affirmed, and respondents can mount a full defence and seek vindication of any allegations of discrimination.

Professor Kerr was cognizant of this in his Shreve decision, where he noted:

One consideration that I have neglected in this analysis is that, if I dismiss or permanently stay the complaint on this basis, the complainant is left without any determination, let alone any redress, with respect to his rights. The way in which the complaint was processed by the Commission has been as detrimental to his interests as it has been to those of the respondents. It is recognition of this that has led boards of inquiry, in the final result, to reject motions such as those of the respondents, notwithstanding relatively serious delays or problems of fairness resulting from the Commission's process. [...]

The only consolation I can offer to the complainant is that a decision such as this may have some effect in reforming the process of the Commission to the benefit of complainants, as well as respondents.

(at paras. 104-105).

In my view, Professor Kerr's decision to try to use the dismissal of a complaint as leverage to ensure that the Commission would reform its procedures was erroneous. There are other avenues to seek this sort of reform, some of them political, some of them bureaucratic, and some of them through the review mechanisms offered by the office of the ombudsman and the Divisional Court. To attempt to reform institutions by

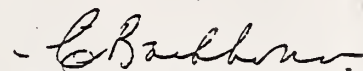
denying individual litigants their only forum for resolving human rights disputes is both unfair and unrealistic. What is more, the message has surely been registered. Do we need additional decisions dismissing complaints in order to underscore the significance of the concerns? Surely this is the wrong reason to stay proceedings at this stage of the inquiry.

Finally, respondents' counsel noted that some of the incidents described in the complaint appear to have occurred prior to the enactment of the 1981 Code. Respondents' counsel and Commission counsel disputed whether the law relating to this complaint was substantively changed with the enactment of the 1981 Code. I believe that matter is better left for further argument at the hearing on the merits. In the interim, however, both counsel agreed that to the extent that the complaint raises individual incidents which occurred prior to 1982, this board must make its decisions on the basis of the earlier legislation.

In summary, then, I find myself unable to grant the order for dismissal or a stay of proceedings requested by respondents' counsel. The respondents' application is denied.

April 21, 1994

Date



Constance Backhouse
Chair, Board of Inquiry

